Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–102–03 OF 2013
AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA
1 NOVEMBER 2013

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Criminal Procedure — Jurisdiction of court — High Court — Inherent jurisdiction — Two principal charges under s 409 and two amended charges under s 418 of the Penal Code — Application to set aside charges and for acquittal and discharge — Whether charge oppressive and abuse of court process — Whether there was miscarriage of justice to warrant setting aside — Whether case was fit and proper case for court to exercise inherent powers to set aside and quash charges

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The appellant was charged in the sessions court with two principal charges under s 409 of the Penal Code ('the Code') and two alternative amended charges under s 418 of the same Code. Before the trial in the sessions court commenced, the appellant took out a notice of motion ('the notice'), seeking for, inter alia, the charges under ss 409 and 418 be set aside and struck off; the appellant to be acquitted and discharged from the charges; and the proceedings of the two cases be suspended and/or stayed pending the disposal of this application. The High Court judge dismissed the notice and hence, the present appeal by the aggrieved appellant. In the present appeal, the appellant argued that the amended criminal breach of trust charges were flawed, defective and tantamount to the appellant being charged for an offence unknown to the Code for the reasons that the charges did not specify the direction of law prescribing the manner in which the trust was to be discharged or of any legal contract made touching on the discharge of the trust.

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Held, dismissing the appeal:

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(1) There could be no doubt that the High Court had the inherent jurisdiction to set aside and quash a charge which was oppressive and an abuse of the court process. The court would only exercise its inherent power when there was miscarriage of justice. The jurisdiction to stay proceedings on the basis of abuse of process was to be exercised with greatest caution. The fact that a prosecution was ill-advised or unwise was no basis for its exercise. A court would have no general power to quash the charge and to decline to allow the trial to proceed where an indictment had been preferred in accordance with the law. This was not a fit and proper case for the court to exercise its inherent powers to set aside and

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quash the charges against the appellant. The appellant had not established that the charges against him were mala fide, oppressive and an abuse of court process (see paras 4 & 14).

(2) The omission to state the mode in which the trust was to be discharged or of any legal contract made touching of the trust was not fatal at this stage of the proceedings. The prosecution during the course of the trial could amend and lead evidence to identify the breach. It was an established principle that with the leave of the court, the prosecution was entitled to amend the charges at any stage of the trial (see para 7).

(3) The rules governing amendment of charges were provided for in ss 158 to 162 and in s 173(h)(ii) of the Criminal Procedure Code ('the CPC'). In the course of the trial, the prosecution was entitled to amend the criminal breach of trust charges (*Public Prosecutor v Yeoh Teck Chye and Lim Hong Pung & Anor v Public Prosecutor* [1981] 2 MLJ 176 referred). Furthermore, s 156 of the CPC provided that no error in stating either the offence or the particulars to be stated in the charge and no omission to state the offence or those particulars would be regarded at any stage of the case as material, unless the appellant was in fact misled by that error or omission. More than that, s 422 of the CPC provided that any error or omission in the charges would not vitiate the proceedings, unless such error or omission had occasioned a failure of justice. Whether the appellant was misled by any error or omission in the charges or whether such error or omission had occasioned a failure of justice could only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge (see paras 7–8).

(4) For the proper determination of the issues raised, it must be pointed out that the trial against the appellant in the sessions court was regulated by s 173 of the CPC. Evidence could be lead to establish the case of the prosecution on a prima facie basis and subsequently beyond reasonable doubt. Since the appellant had pleaded not guilty to the charges, in accordance with s 173(c) of the CPC, the sessions court proceeded to take all such evidence as might be produced in support of the prosecution (see para 10).

[Bahasa Malaysia summary

Perayu telah didakwa di mahkamah sesyen dengan dua pertuduhan utama di bawah s 409 Kanun Keseksaan ('Kanun') dan dua tuduhan alternatif dipinda di bawah s 418 Kanun yang sama. Sebelum perbicaraan di mahkamah sesyen bermula, perayu memohon notis usul ('notis'), menuntut, antara lain, tuduhan di bawah ss 409 dan 418 diketepikan dan dibatalkan; perayu dibebaskan dan dilepaskan daripada tuduhan dan prosiding dua kes digantung dan/atau tidak diselesaikan sementara menunggu permohonan ini. Hakim Mahkamah Tinggi menolak notis dan dengan itu, rayuan ini oleh perayu yang terkilan itu. Dalam

rayuan ini, perayu berhujah bahawa dakwaan pecah amanah yang dipinda adalah cacat, rosak dan sama seperti perayu didakwa bagi suatu kesalahan yang tidak diketahui oleh Kanun untuk sebab-sebab bahawa dakwaan-dakwaan tersebut tidak menyatakan arahan undang-undang yang menetapkan cara bagaimana pelepasan amanah itu atau mana-mana kontrak undang-undang yang dibuat menyentuh tentang pelepasan amanah itu.

Diputuskan, menolak rayuan:

(1) Tidak ada keraguan bahawa Mahkamah Tinggi mempunyai bidang kuasa sedia ada untuk mengetepikan dan membatalkan tuduhan yang menindas dan satu penyalahgunaan proses mahkamah. Mahkamah hanya akan menjalankan kuasa yang sedia ada apabila terdapat ketidakadilan. Bidang kuasa untuk menggantung prosiding atas dasar penyalahgunaan proses itu akan dilaksanakan dengan sangat berhati-hati. Fakta bahawa pihak pendakwaan keliru atau kurang bijak bukanlah merupakan asas untuk menjalankannya. Mahkamah tidak akan mempunyai kuasa am untuk membatalkan tuduhan dan menolak untuk membenarkan perbicaraan itu untuk diteruskan di mana telah diutamakan mengikut undang-undang. Ini bukan kes yang layak dan sesuai untuk mahkamah menjalankan kuasa sedia ada untuk mengetepikan dan membatalkan tuduhan terhadap perayu. Perayu telah tidak dapat membuktikan bahawa dakwaan terhadapnya adalah mala fide, menindas dan menyalahgunakan proses mahkamah (lihat perenggan 4 & 14).

(2) Peninggalan untuk menyatakan cara bagaimana amanah itu kena disempurnakan atau apa-apa kontrak yang dibuat menyentuh undang-undang amanah itu adalah tidak penting di peringkat prosiding. Pihak pendakwaan sewaktu perbicaraan boleh meminda dan mengemukakan keterangan bagi mengenal pasti pelanggaran itu. Ia adalah prinsip yang ditetapkan bahawa dengan kebenaran mahkamah, pihak pendakwaan berhak untuk meminda pertuduhan, di mana-mana peringkat perbicaraan (lihat perenggan 7).

(3) Kaedah-kaedah yang mengawal pindaan pertuduhan diperuntukkan dalam ss 158–162 dan dalam s 173(h)(ii) Kanun Tatacara Jenayah ('KTJ'). Dalam perbicaraan, pihak pendakwaan berhak untuk meminda dakwaan jenayah pecah amanah (*Public Prosecutor v Yeoh Teck Chye and Lim Hong Pung & Anor v Public Prosecutor* [1981] 2 MLJ 176 dirujuk). Tambahan pula, s 156 KTJ memperuntukkan bahawa tiada kesilapan dalam menyatakan sama ada kesalahan atau butir-butir yang dinyatakan dalam pertuduhan dan tiada peninggalan untuk menyatakan kesalahan atau butir-butir itu akan dianggap di mana-mana peringkat kes itu sebagai bahan, melainkan jika perayu sebenarnya telah terkeliru oleh kesilapan atau peninggalan. Lebih daripada itu, s 422 KTJ

memperuntukkan bahawa apa-apa kesilapan atau peninggalan dalam tuduhan tidak akan melemahkan prosiding, melainkan jika kesilapan atau peninggalan itu telah menyebabkan kegagalan keadilan. Sama ada perayu dikelirukan oleh apa-apa kesilapan atau peninggalan dalam tuduhan atau sama ada kesilapan atau peninggalan itu telah menyebabkan kegagalan keadilan hanya boleh ditentukan pada akhir perbicaraan itu dengan mengambil kira keseluruhan keterangan itu dikemukakan di hadapan hakim perbicaraan (lihat perenggan 7–8).

(4) Bagi penentuan yang betul untuk isu yang dibangkitkan, ia hendaklah menunjukkan bahawa perbicaraan terhadap perayu di mahkamah sesyen telah dikawal selia oleh s 173 KTJ. Keterangan boleh dikemukakan untuk membuktikan kes pendakwaan atas dasar prima facie dan seterusnya melampaui keraguan munasabah. Memandangkan perayu telah mengaku tidak bersalah terhadap tuduhan-tuduhan tersebut, mengikut s 173(c) KTJ, mahkamah sesyen telah meneruskan untuk mengambil segala keterangan yang mungkin dikemukakan bagi menyokong pendakwaan (lihat para 10).]

Notes

For cases on High Court, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2540–2554.

Cases referred to

Connelly v Director of Public Prosecutions [1964] 2 All ER 401, HL (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 6 MLJ 533, CA (refd)
Director of Public Prosecutions v Humphrys [1976] 2 All ER 497, HL (refd)
PP v Heng You Nang [1949] MLJ 285 (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
PP v Francis Dang anak Nuya [1988] 1 MLJ 89 (refd)
PP v Ini Abong and other trials [2008] 8 MLJ 106, HC (refd)
PP v Tan Kim Kang & Ors [1962] MLJ 388 (refd)
PP v Yeoh Teck Chye and Lim Hong Pung & Anor v PP [1981] 2 MLJ 176, FC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 156, 157, 158, 159, 160, 161, 162, 173, 173(c), (h)(ii), 409, 418, 422
Evidence Act 1950
Penal Code ss 409, 418

Appeal from: Criminal Application No 44–225/12 of 2012 (High Court, Kuala Lumpur)

Datuk Mohd Yusof Hj Zainal Abiden ((Stanley C Augustin, Devanandan S Subramaniam, Lim Kon Keen and Kamarul Hisham Kamaruddin with him) (Stanley Augustin & Co) for the appellant.
Kevin Morais (Muhammad Saifuddin Hashim Musaimi with him) (Deputy Public Prosecutors, Malaysian Anti-Corruption Commission) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] On 17 July 2012, Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid ('the appellant') was charged in the Sessions Court at Kuala Lumpur with two principal amended charges under s 409 of the Penal Code ('the Code') (case No 62–563–07 of 2012) and two alternative amended charges under s 418 of the same Code (case No 62–564–07 of 2012).

[2] Subsequently, before the commencement of the trial at the sessions court, the appellant took out a notice of motion dated 2 January 2013 at the Kuala Lumpur High Court seeking the following orders:

(a) the charges against the appellant under ss 409 and 418 of the PC in cases No 62–563–07 of 2012 and 62–564–07 of 2012 to be set aside and struck off;

(b) the applicant to be acquitted and discharged from the charges;

(c) the proceeding of these two cases be suspended and/or stayed pending the disposal of this application; and

(d) any relief or direction or further order deemed fit and appropriate.

[3] On 15 March 2013 after hearing the notice of motion, the learned High Court judge dismissed it. Aggrieved by that decision, the appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We now give our reasons for so deciding.

[4] There can be no doubt that the High Court has the inherent jurisdiction to set aside and quash a charge which is oppressive and an abuse of the process of the court (see: *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401, *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497, *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 6 MLJ 533). The court will only exercise its inherent power when there is miscarriage of justice (see *Karpal Singh & Anor v Public Prosecutor* and *Public Prosecutor v Ini Abong and other trials* [2008] 8 MLJ 106). The jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with greatest caution; the fact that a prosecution is ill advised or

unwise is no basis for its exercise (see *Archbold 2007: Criminal Pleading, Evidence and Practice*, p 358). A court has no general power to quash the charge and to decline to allow the trial to proceed where an indictment has been preferred in accordance with the law (see *Director of Public Prosecutions v Humphrys*).

[5] From these introductory general principles, we now turn to the issues raised in this appeal before us. First, we shall deal with the first and second principal amended charges against the appellant in relation to an offence of criminal breach of trust by an agent under s 409 of the Code. We have read in detail the amended principal charges as can be seen at pp 91–92 of the appeal record. We noted that the charges disclosed that the appellant was charged in his capacity as President and Group Chief Executive of Sime Darby Bhd. The amended charges then go on to specify that in such capacity, the appellant was entrusted with dominion over the funds of the company to acquire native customary rights ('NCR') lands under the Sarawak Upstream Expansion Plan. The charges then asserted that the appellant committed criminal breach of trust in dishonestly causing Sime Darby Plantations, a subsidiary of Sime Darby to make payments amounting to RM16,816,217 and RM85,023,047.20 respectively in having to acquire Nature Ambience Sdn Bhd and Vertical Drive Sdn Bhd.

[6] Datuk Mohd Yusof bin Zainal Abiden, learned counsel for the appellant argued that the amended criminal breach of trust charges were flawed, defective and tantamount to the appellant being charged for an offence unknown to the Code for the reasons that the charges did not specify the direction of law prescribing the manner in which the trust was to be discharged or of any legal contract made touching on the discharge of the trust.

[7] With respect, we are unable to agree with the contention of learned counsel for the appellant. In our view, the omission to state the mode in which the trust is to be discharged or of any legal contract made touching of the trust is not fatal at this stage of the proceedings. We agree with the submissions of Mr Kevin Morais, the learned deputy public prosecutor ('DPP') to the effect that the prosecution during the course of the trial can amend and lead evidence to identify the breach. In this regard, it is an established principle that with the leave of the court, the prosecution is entitled to amend the charges at any stage of the trial (see *Heng You Nang v Public Prosecutor* [1949] MLJ 285, *Public Prosecutor v Francis Dang anak Nuya* [1988] 1 MLJ 89, *Public Prosecutor v Tan Kim Kang & Ors* [1962] MLJ 388). The rules governing amendment of charges are provided for in ss 158–162 and in s 173(h)(ii) of the Criminal Procedure Code ('the CPC'). The case of *Public Prosecutor v Yeoh Teck Chye* [1981] 2 MLJ 176 demonstrates that in the course of the trial, the prosecution is entitled to amend the criminal breach of trust charges.

[8] Furthermore, s 156 of the CPC provides that no error in stating either the offence or the particulars to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the appellant was in fact misled by that error or omission. More than that, s 422 of the CPC provides that any error or omission in the charges would not vitiate the proceedings, unless such error or omission has occasioned a failure of justice. In our view, whether the appellant was misled by any error or omission in the charges or whether such error or omission has occasioned a failure of justice can only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge.

[9] Learned counsel for the appellant also raised the following issues to support his contention that the principal amended charges against the appellant were groundless, mala fide and an abuse of the court process. First, the appellant was entrusted with the funds of Sime Darby Bhd to obtain NCR lands but the eventual payments were made from Sime Darby Plantations in which the appellant had no connection with the dominion of the funds. Secondly, the appellant was not responsible for the approval and eventual payments made by Sime Darby Plantations to purchase Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd. And thirdly, the acquisition of Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd were made pursuant to a resolution approved by the Board of Directors of Sime Darby Bhd on 11 September 2008.

[10] In our view, based purely on the documents that have been supplied by the prosecution to the appellant pursuant to s 51A of the CPC, it is premature at this early stage of the proceedings for the court to decide on the three issues raised by learned counsel. Documentary evidence must be viewed in the light of the case as a whole and it would be wrong for the court to consider these documents in isolation. The prosecution is entitled to produce these documents during the trial through its relevant witnesses in order to unravel the case for the prosecution in its proper context. The prosecution is entitled to explain through its relevant witnesses, within the limits of the relevant provisions of the Evidence Act 1950, how these documents came into existence and how these documents fit into the prosecution's case. When the case for the prosecution is concluded, after the prosecution has examined its witnesses, who may in turn be cross-examined and if necessary re-examined, only then the court shall consider based on the entire evidence whether the prosecution has made out a prima facie case against the appellant. For the proper determination of the issues raised by learned counsel, it must be pointed out that the trial against the appellant in the sessions court is regulated by s 173 of the CPC. Evidence could be lead to establish the case of the prosecution on a prima facie basis and subsequently beyond reasonable doubt. Since the appellant had

pleaded not guilty to the charges, in accordance with s 173(c) of the CPC, the sessions court shall proceed to take all such evidence as may be produced in support of the prosecution.

[11] We turn next to the first and second alternative amended charges, which can be seen at pp 87–88 of the appeal record. These. are charges relating to an offence of cheating under s 418 of the Code. In substance, the two charges asserted that the appellant had cheated the Board of Directors of Sime Darby Bhd by omitting to inform the said board that the NCR lands approved to Sime Darby Bhd had instead been awarded to Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd. We are of the view that a plain reading of these amended cheating charges clearly indicate the offences with which the appellant were charged and they contained sufficient particulars which the prosecution intended to prove against the appellant.

[12] Regarding the alleged defect of these charges, it is the contention of learned counsel for the appellant that the Board of Directors of Sime Darby Bhd did not meet to discuss the acquisition of the two companies on the dates specified in both the alternative charges. It was therefore argued that there was no omission on the part of the appellant to inform the Board of Directors of Sime Darby Bhd that the NCR lands approved to Sime Darby Bhd had instead been awarded to Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd.

[13] With respect we are also unable to accede to this contention. In this regard, we find there is merit in the arguments of the learned DPP that the prosecution is entitled to adduce evidence during the trial that the omission as stated in the cheating charges was not in relation to the Board of Directors of Sime Darby Bhd. It is premature at this stage to preclude the prosecution from adducing admissible and relevant evidence during the trial through witnesses that these relevant facts should have been brought to the knowledge of the Board of Directors of Sime Darby Bhd at any time and not necessarily at the Board of Director meeting. As emphasised by the learned DPP for the purposes of the trial the prosecution would not only depend on the documentary evidence but equally viva-voce evidence to establish its case.

[14] For all these reasons, we are of the view that this is not a fit and proper case for the court to exercise its inherent powers to set aside and quash the charges against the appellant. The appellant had not established that the

charges against him were mala fide, oppressive and an abuse of the process of the court. We had accordingly dismissed the appeal. We hereby affirm the decision of the learned High Court judge.

Appeal dismissed.

Reported by Afiq Mohamad Noor